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American Indian Tribes and Secession

Erik M. Jensen

AMERICAN INDIAN TRIBES AND SECESSION

Erik M. Jensen†

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I. INTRODUCTION

Secession theory, which has become more prominent in a world that worships self-determination, might have a role to play in the development of American Indian law. This article is a call for consideration of how that theory could reinvigorate some American Indian tribes.

II. ASSIMILATION VERSUS SEPARATION

> *Federal Indian policy has always dealt, at its nub, with the question of whether and to what extent the United States should permit, encourage, or force the assimilation of American Indians into the majority society.*[1]

The official status of Indian tribes within the American regime has fluctuated over time. In some eras, most recently during the Eisenhower administration, termination of the tribes and assimilation

† Professor of Law, Case Western Reserve University, Cleveland, Ohio. S.B. 1967, Massachusetts Institute of Technology; M.A. 1972, University of Chicago; J.D. 1979, Cornell Law School.

1. DAVID H. GETCHES ET AL., FEDERAL INDIAN LAW: CASES AND MATERIALS 25 (3d ed. 1993).

of tribal members into the larger society have been the explicit goals of federal policy.[2] At other times, preserving tribes as distinct entities within United States boundaries has been given precedence.[3]

The present policy is to protect traditional Indian societies as much as possible and, to a great extent, to maintain their insulation from the majority society. The separation is not complete: Charles Wilkinson calls the policy "measured separatism" in that the tribes are subject to the ultimate power of the United States.[4] Nevertheless, the separation is substantial and is, if anything, becoming more entrenched.[5]

In part, the historical flip-flop in federal policy reflects legitimate unease with the idea of separation.[6] Assimilationist policies have often been associated with land grabbing and other acts of overreaching by non-Indians, but not all advocates of assimilation have been badly motivated. Many who have argued for the termination of the tribes have done so in a good-faith belief that full participation in the larger society is best for individual Indians—indeed, that treatment of Indians as men and women endowed with inalienable natural rights requires no less.[7] That view may be misguided—at this point I believe the question remains an open one—but it is not inherently evil.

Good-faith proponents of assimilation might also question, with political scientist Thomas Flanagan, whether "any group [has] a right to expect that it can continue to live as it always has."[8] I cannot prove

2. *See* JANET A. MCDONNELL, THE DISPOSSESSION OF THE AMERICAN INDIAN, 1887-1934 (1991); NICHOLAS C. PEROFF, MENOMINEE DRUMS: TRIBAL TERMINATION AND RESTORATION, 1954-1974 (1982).

3. *See* S. LYMAN TYLER, A HISTORY OF INDIAN POLICY 71-94, 125-50 (1973) (discussing pre-1887 reservation policy and 1934-53 tribal self-government policy).

4. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 14-19 (1987). On federal plenary power, see Nell Jessup Newton, *Federal Power over Indians: Its Sources, Scope, and Limitations,* 132 U. PA. L. REV. 195 (1984).

5. *See generally* STEPHEN CORNELL, THE RETURN OF THE NATIVE: AMERICAN INDIAN POLITICAL RESURGENCE (1988).

6. The unease is not new. *See* Austin Abbott, *Indians and the Law,* 2 HARV. L. REV. 167, 174 (1888) (stating that "the ultimate objective point to which all efforts for progress should be directed is to fix upon the Indian the same personal, legal, and political status which is common to all other inhabitants").

7. *See* Nancy O. Lurie, *The Contemporary American Indian Scene, in* NORTH AMERICAN INDIANS IN HISTORICAL PERSPECTIVE 156 (Eleanor B. Leacock & Nancy O. Lurie eds., 1971) ("there is no question that termination and related legislation [in the 1950s] were strongly endorsed by well-meaning legislators who were influenced by analogies to the Negro movement for civil rights"), *quoted in* PEROFF, *supra* note 2, at 64; *see also* GETCHES ET AL., *supra* note 1, at 29 ("The inconsistency of having islands of racial groups in a country that fought a civil war and has spent the last one hundred years struggling to accept the goal of racial integration is a rallying point for some who would extinguish or revise Indian rights.").

8. Thomas Flanagan, *The Agricultural Argument and Original Appropriation: Indian Lands and Political Philosophy,* 22 CAN. J. POL. SCI. 589, 600 (1989).

it, but I suspect that almost all traditional societies trying to maintain their existence within the boundaries of industrialized nation-states cannot make it on their own—that they do not fare well without affirmative support from the national governments. If I am right about that, the existence of these traditional societies is somewhat artificial. Does a dominant culture have the obligation to preserve aboriginal societies that, left to their own devices, would decline as a result of inexorable economic and historical forces?[9]

Whatever the answer to that question, separation, in the form of measured separatism, once again became federal policy in the 1960s, and it has continued to this day. Not all Indians are separated from the rest of American society,[10] of course, but the heart of the American Indian population remains the reservations, most of which are far from urban centers and even farther from the larger American population culturally. About half the American Indian population, which totals nearly two million persons, resides on or near a reservation.[11] It is those reservation tribes, which occupy lands that have for decades (and sometimes centuries) been identified as tribal territory,[12] that I am concerned with in this article.

III. THEORETICAL PROBLEMS WITH SEPARATE COMMUNITARIAN SOCIETIES

The present political status of reservation Indians within the United States is theoretically unsound. It is inconsistent with American political philosophy in at least two respects:[13] the relationship of

9. *Cf.* GETCHES ET AL., *supra* note 1, at 29 ("Is there a basic value in preserving an indigenous culture, even at some cost to the dominant culture?").

10. Many Indians have been fully assimilated over the years, and others, pushed by federal relocation programs in the 1950s, have formed enclaves within American cities, in something like the time-honored immigrant fashion. *See, e.g.,* JOAN WEIBEL-ORLANDO, INDIAN COUNTRY, L.A.: MAINTAINING ETHNIC COMMUNITY IN COMPLEX SOCIETY (1991). Moreover, there are substantial tribal concentrations near non-Indian population centers, such as Phoenix, Seattle, and Miami. *See* WILKINSON, *supra* note 4, at 25.

11. *See* GETCHES ET AL., *supra* note 1, at 15. According to 1990 census statistics, the American Indian population is 1.878 million. *See* BUREAU OF THE CENSUS, AMERICAN INDIAN POPULATION BY TRIBE FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES: 1990, at 1 (1992). That figure probably should be discounted somewhat because of the self-identification process used in its collection. *See* Elouise Schumacher, *The Native American Numbers Game—Tribal Leaders Doubt Population Gain, Suspect 'Wannabes' Covet Benefits,* SEATTLE TIMES, Nov. 23, 1992, at A1.

12. For present purposes, it does not matter how the reservations were created—through treaty, statute, executive order, or otherwise. Nor does it matter whether legal title to tribal territories has vested in the tribes.

13. I include constitutional concepts in "American political philosophy," but the philosophical underpinnings of the American regime go beyond mere legalisms.

tribal members to tribal governments, and the relationship of tribes and their members to the larger, non-Indian society.

A. *Tribal Members and Tribal Governments*

Without exception, traditional Indian societies—now made up, it must be remembered, of U.S. citizens[14]—reflect political philosophies that are much more communitarian than the political philosophy guiding the rest of the American population. The prevailing American emphasis on individual rights as limitations on governmental power ends, in many respects, at reservation boundaries.[15]

Charles Wilkinson has argued that "[t]oday there is widespread recognition of the general principle that basic human rights include the right of aboriginal peoples to live and develop their economies and societies free of the control of the dominant society."[16] Such a norm may be developing internationally,[17] but it does not fit well into the American system.

The posited "basic human right" is a group right. Yes, theorists have been developing the concept of group rights—rights that exist above and beyond those that inure to individuals making up groups[18]—but the work of these theorists is an extension of accepted American constitutional principles. For one thing, the right that Wilkinson describes is silent about the relationship between individual

14. All American Indians "born within the territorial limits of the United States" are citizens of the United States, regardless of their wishes, as a result of a 1924 statute. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified at 8 U.S.C. § 1401(b) (1988)).

15. Barsh and Henderson have criticized federal attempts to subvert tribalism in favor of "the naked, alienated individualism and formal equality of contemporary American society." RUSSEL L. BARSH & JAMES Y. HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY viii (1980). Robert Williams has decried the "Westernized atomistic worldview" that makes it difficult for the larger Eurocentric society to see value in Indian cultures. Robert A. Williams, Jr., *Learning Not to Live with Eurocentric Myopia,* 30 ARIZ. L. REV. 439, 447 (1989); *see also* Fred Coyote, *Land Holds Families Together, in* I WILL DIE AN INDIAN 15 (1980), *quoted in* GETCHES ET AL., *supra* note 1, at 26 ("I make a lousy citizen of the United States because I have got to have my people, my family, with me all the time. I cannot operate as an individual.").

16. Charles F. Wilkinson, *Civil Liberties Guarantees When Indian Tribes Act as Majority Societies: The Case of the Winnebago Retrocession,* 21 CREIGHTON L. REV. 773, 796-97 (1988) (footnotes omitted).

17. *See* Raidza Torres, *The Rights of Indigenous Populations: The Emerging International Norm,* 16 YALE J. INT'L L. 127 (1991); *see generally* PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (1991).

18. *See, e.g.,* Aviam Soifer, *Freedom of Association: Indian Tribes, Workers, and Communal Ghosts,* 48 MD. L. REV. 350 (1989). Indeed, the group rights may be such that in some cases "group identity is protected even when individuals would not be"—or so it is argued. *Id.* at 357; *see also* Philip P. Frickey, *Scholarship, Pedagogy, and Federal Indian Law,* 87 MICH. L. REV. 1199, 1204 (1989)(book review)(Indians' special status "distinguishes them from other American minorities, which have been largely unsuccessful in pursuing group rights.").

Indians and the tribes of which they are members. How does one reconcile group and individual rights when they are in conflict—something that will inevitably occur in any society?[19]

When the focus is on individual tribal members and their relationships to their tribes, the tension with American political philosophy becomes apparent. We have no reason to think that tribal governments are immune from the incentives and pressures that lead other governments to abuse power. Yet nothing like the incorporation doctrine, under which many Bill of Rights principles are deemed to apply to the states, has developed to cover Indian tribes.[20] To the extent that Bill of Rights principles limit tribal action against individual tribal members, it is because of federal statute, not the Constitution.[21] And the statute intended to extend such protection to individual tribal members, the Indian Civil Rights Act of 1968, has been interpreted so narrowly that members aggrieved by actions of their tribal governments often have no real recourse against tribal officials.[22]

For present purposes, I am willing to concede that the immunity of tribes from constitutional limitations is not a problem of *constitutional* dimension. The existence of tribes is recognized in the Indian Commerce Clause,[23] and at the time of the nation's founding, tribes were obviously not expected to adopt individualistic principles. Because the tribes were understood by the founders to be different[24]—and separate[25]—the communitarian aspects of tribes presented no direct conflict with constitutional standards.

19. *See* Martha Minow, *Pluralisms*, 21 U. CONN. L. REV. 965, 970 (1989) ("Potential conflict within a minority group surely complicates the problem of pluralism: is the group, or are its members, entitled to respect?").

20. *See* Native Am. Church v. Navajo Tribal Council, 272 F.2d 131, 134 (10th Cir. 1959) (holding that First Amendment establishment clause does not apply to tribes, which "have a status higher than states").

21. The Bill of Rights and the Fourteenth Amendment of course protect tribal members vis-a-vis federal and state governments in the same way they protect nonmembers.

22. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (Indian Civil Rights Act held to create no cause of action for tribal members in federal court; Congress had not explicitly waived tribal sovereign immunity). The effect of *Santa Clara* is that, except where *habeas corpus* relief is available, tribal members are left with tribal courts to hear their grievances, and those tribal courts may be controlled by the very people complained about.

23. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce . . . with the Indian Tribes . . . .").

24. I have discussed the founders' conceptions of Indians and blacks in Erik M. Jensen, *Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench*, 1987 B.Y.U. L. REV. 1103, 1114-15 (1987).

25. It was generally assumed that the tribes with which the United States would engage in commerce would exist outside U.S. boundaries—eventually if not immediately—and that in the long run the tribes would disappear.

But we are no longer in the founding period. Members of tribes within U.S. boundaries are now U.S. citizens, entitled to the protection of constitutional principles—at least with respect to federal and state governments.[26] And even if the effective exemption of tribal governments from constitutional limitations is not objectionable from a technical, legal standpoint, it remains more than a little troubling to have American citizens subject to the power of constitutionally recognized entities—the tribes—when the power of those entities against tribal members is unconstrained.

B. *Tribes, Tribal Members, and the Larger Society*

To be sure, the inconsistency between tribal societies and the rest of America is not apparent to many non-Indians because most reservation tribes are so isolated. But that isolation itself creates a second point of tension with American political philosophy. A policy of measured separatism does not comfortably fit the moral teachings of *Brown v. Board of Education*,[27] the landmark school desegregation case. Among its many virtues, *Brown* is a statement of the need to emphasize common, not separatist, values in America.

Brown emphasized that education

> is required in the performance of our most basic public responsibilities, even service in the armed forces. *It is the very foundation of good citizenship.* Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[28]

That passage stresses several points. Most important is the traditional civilizing role of education. Training for citizenship in a pluralist society requires education in common values, but with as diverse a student body as possible. As J. Harvie Wilkinson explained, "That was education's social, or to use Professor Bickel's term, 'assimilationist' mission."[29]

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26. *See supra* note 14. I do not mean to suggest that only citizens benefit from constitutional protections. But surely citizens are entitled to no less protection than is available to others.

27. 347 U.S. 483 (1954).

28. *Id.* at 493 (emphasis added).

29. J. HARVIE WILKINSON, FROM *Brown* to *Bakke*: The Supreme Court and School Integration, 1954-1978 at 42 (1979) (quoting ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 121 (1970)). I understand that not everyone believes the *Brown* opinion, as distinguished from the case's result, should be taken seriously today. The assimilationist aspects

In one important respect, *Brown* is irrelevant to American Indians: the *constitutional* principles behind *Brown* are almost certainly inapplicable to the analysis of Indian separation. Judicial decisions in recent years have been consistent in finding no equal protection problems associated with differential treatment of American Indians. For constitutional analysis, the tribes are political entities, the Supreme Court has concluded, not racial aggregations.[30]

But it is hard not to see the tribes as racially defined in important ways, and many tribal friends have conceded as much. For example, Charles Wilkinson has put the question bluntly: "Why is it, ultimately, that this nation should accept the idea of these sovereign governments whose citizens are determined by race?"[31] Even if one concedes, as I am willing to do, that the Constitution permits Indian separation as a legal matter, that separation exists in tension with *Brown's moral* principles.

It is no answer to this dilemma to suggest, as some have, that we face an either/or choice between race-based separation and something approaching cultural genocide, with the elimination of "Indianness" in the United States.[32] There is no doubt that, if those were the only possibilities, any reasonable person would opt for separation. In fact, however, the American experience has preserved many different cultural attributes while simultaneously achieving a great deal of assimilation. The melting pot may not be the best metaphor to describe the immigrant experience, but neither is it wholly inaccurate.

Full homogenization did not—and probably should not—occur, but stable nations cannot exist without generally accepted values.

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of *Brown* have fallen by the wayside in a society moving toward multiculturalism. Even those who have used acceptance of *Brown* as a prerequisite for judicial appointment have ignored the assimilative teachings of the case. *See, e.g.,* Ronald Dworkin, *The Bork Nomination,* 34 N.Y. REV. BOOKS, Aug. 13, 1987, at 3. But judicial opinions are important not only because of who wins; the *law* of a case is the reasoning.

30. *See* Morton v. Mancari, 417 U.S. 535, 554 (1974) ("[hiring preference for Bureau of Indian Affairs] is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities"). One of the few authors to take seriously the Equal Protection Clause in Indian law analysis is David Williams. Williams concludes that by its own terms the clause seems to apply, but he imaginatively argues that it was not intended to apply to tribes. David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples,* 38 UCLA L. REV. 759 (1991).

31. Wilkinson, *supra* note 16, at 794; *see also* Williams, *supra* note 30, at 822:

> [I]f racial subnations are an appropriate remedy for the theft of Indian lands and sovereignty, they should also be an appropriate remedy for the theft of African-American lands and sovereignty. At that point the liberal individualist promise of the equal protection clause seems to disappear into a nightmare of racial homelands.

32. *See, e.g.,* GETCHES ET AL., *supra* note 1, at 29 ("Should the role of the law be to homogenize society? Or should it be flexible enough to preserve difference and diversity?").

Recognizing that some principles are so fundamental to the American regime that contrary cultural influences must give way in practice, policy-makers in the late nineteenth and early twentieth centuries made a conscious effort to instill American political values in immigrants. An easy, albeit more modern, example: no matter how fervent and sincere segregationists were in voicing opposition to racial integration—as they were permitted to do by the First Amendment—their views of the appropriate ordering of society could not prevail.

All of this is not to say that Indian separation must end; in fact, I have supported the concept in print.[33] But the issue is not an easy one, and the tension with *Brown* is real. Justifications for Indian separation in a nation that condemns racial segregation exist, but they are not self-evident.

C. *Why the Issues Will Not Go Away*

Consideration of further changes in the federal-state-tribal relationship is, I suggest, inevitable. The philosophical tension between the tribal islands of communitarianism (comprised of U.S. citizens) and the sea of liberal individualism surrounding those islands, coupled with the tension between a policy of separation and the principles of *Brown*, is sufficiently great that the issues cannot be ignored forever.

Those tensions do not seem compelling to everyone, I admit, and most of the American population loses no sleep worrying about Indian separation. The contrast is enough, however, that it prevents the tension from disappearing completely from the public consciousness.

Compromise is difficult, if not impossible. Of course, both communitarian and individualistic values will be represented in any society and, while I characterize the majority American society as individualistic, I recognize that there is a communitarian revival of sorts going on.[34] But the fact that a "revival" is deemed necessary underscores the limited role communitarianism has played in American life—at least recently. And the revival is largely inapplicable to my concerns because it has focused on recreating a sense of duty to the larger society, not on building a sense of community within small groups. (That latter sense of "community" can lead to factionalism at its worst.) In short, the U.S. government cannot countenance a significant diminution in the importance of individual rights without fundamentally changing the American regime. On the other hand, neither

33. *See* Jensen, *supra* note 24, at 1136-37.

34. *See* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA (1993).

can tribes become substantially more individualistic—adapting to majority American views on individual rights—without changing in basic ways.

Separation, too, is a difficult issue for significant compromise given the moral principles of *Brown*. Promises were indeed made to the Indian tribes, but promises should not trump higher values.[35] We need to look elsewhere for principles to rationalize the political status of reservation Indians within the American regime.

IV. Two Possible Resolutions of the Theoretical Problems

The theoretical problems could be resolved in either of two diametric ways.[36] Complete assimilation would eliminate the tensions, with individual Indians' becoming full participants in the larger society. By definition, the relationships of tribal members to their tribes and of the tribes to the larger society become nonissues if there are no longer any tribes. That was the position taken in the early Eisenhower administration.[37]

Since the 1960s, however, full assimilation has not been seriously considered in high government circles.[38] Nor is it a view evident in academia—at least not among those specializing in American Indian law.

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35. *See* Wilkinson, *supra* note 4, at 6:

> [E]ven if separate lands were promised to tribal control more than a century ago, how can the United States, consistent with its democratic ideals, allow race-based Indian tribes to govern the non-Indians who have lawfully entered those lands to live and to do business over the course of the ensuing generations?

See also Williams, *supra* note 30, at 815:

> [P]romise-keeping is never an absolute value in constitutional law, nor should it be when in tension with other constitutional values. Suppose, for example, that the federal government had solemnly promised the antebellum Cherokees that they could keep their black slaves and the federal government would return escaped slaves. . . . If the reservation system really does rest on racial classifications, then, a mere promise would not save it.

36. A third possibility is that American society might become indifferent to increasing tribalism—that is, that what I have loosely called "American political philosophy" might change in fundamental ways. For the purposes of this article, however, I take the individualist (and assimilationist) premises of twentieth century America as givens.

37. *See supra* note 2 and accompanying text. Senator Arthur Watkins of Utah, the architect of the Eisenhower attempt at termination, is often portrayed as a villain, but he did operate from principle: "He exalted individual initiative and private property; and he looked with deep suspicion upon a policy putting group interests before those of the individual." Gary Orfield, A Study of the Termination Policy ch. 6, at 1 (1965), *quoted in* Peroff, *supra* note 2, at 59.

38. Legislation is occasionally introduced that would return Indian policy to an assimilationist goal, but in recent years none has survived the initial stages of the legislative process. *See* Barsh & Henderson, *supra* note 15, at 291.

The other extreme, the revival of the tribes as fully sovereign nations, has had more supporters. The late D'Arcy McNickle, for example, urged that the United States "[r]eturn the right of decision to the tribes—restore their power to hold the dominant society at arm's length."[39]

If we (and here I mean non-Indians generally) were starting from scratch in putting together the American nation-state, we might well decide—presumptuously, as if it were our decision alone—that Indian tribes should remain as separate nations, and that those nations could hold the dominant society on the North American continent at bay.[40] Certainly we would want to avoid the historical flow that gave rise to so many inequities. We would want to treat the tribes and their members as equals and to keep the nation's promises.

Had history taken such a different course, with tribal nation-states populating the North American continent, the tribes would now govern themselves, and they would deal with the United States on a nation-to-nation basis. Such a state of affairs would not be without drawbacks: a world made up of racially and ethnically defined nation-states is not one that I am comfortable with. But there is nothing necessarily wrong with states formed on racial or ethnic bases, so long as the exclusionary principles do not depend on any perceived inferiority of the excluded populations. As Barsh and Henderson argue, pointing to Italy and Japan, "The mere fact that a political unit has a racial characteristic does not render it racist."[41] Indeed, the international law movement toward self-determination of "peoples" presupposes the possibility of racial or ethnic determination.

If we want to take the idea of separate Indian nations seriously—and I assume many do[42]—we cannot simply turn back the clock. We need to consider how to get there from where we now are. And while

39. DARCY MCNICKLE, THEY CAME HERE FIRST 285 (rev. ed. 1975); *see also* Russel L. Barsh, *Indigenous North America and Contemporary International Law,* 62 OR. L. REV. 73 (1983); Rachel San Kranowitz et al., Comment, *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations,* 22 HARV. C.R.-C.L. L. REV. 507, 586-602 (1987).

40. Boundary issues might still arise, and the very idea of distinct boundaries to tribal lands might cause some cultural discomfort among the tribes. Nevertheless, the idea of tribes as fully sovereign nations does no violence to sovereignty notions.

41. BARSH & HENDERSON, *supra* note 15, at 246.

42. One might question whether all who argue for fully sovereign status for tribes really mean it, or whether they assume that the federal government will always provide a safety net. For an example of an article curiously calling for just about every step in "decolonization" except actual severing of federal-tribal ties, see Robert N. Clinton, *Redressing the Legacy of Conquest: A Vision for a Decolonized Federal Indian Law,* 46 ARK. L. REV. 77 (1993).

complete separation could be a theoretically pure position—consistent with constitutionally derived moral and legal principles—its proponents provide little or no analysis of how to arrive at the desired result starting from the present doctrinal position. It is not enough to wish that the last several centuries be undone.

V. A ROLE FOR SECESSION THEORY?

In particular, the new separatist writings contain no references to secession theory, which is enjoying a revival in other contexts.[43] A resurgence in academic writing on secession has been fueled by several extra-academic factors: the breakup of eastern European nation-states, the possible disintegration of the Canadian federation, and the strengthening of self-determination as a goal for peoples of the world.[44]

Consider this statement by philosopher Allen Buchanan:

> [N]either side [in the debates between individualism and communitarianism] has taken seriously the possibility of secession as a way of preserving a general commitment to liberal institutions while accommodating the fact that there are some forms of community that cannot flourish within the liberal state but which it would be wrong to try to force to conform.[45]

Buchanan is not writing about America's indigenous populations, but his words suggest a plausible basis for further separation of at least some Indian tribes from the United States. If there is to be a doctrine

43. Recent books on secession include MILICA Z. BOOKMAN, THE ECONOMICS OF SECESSION (1993); ALLEN BUCHANAN, SECESSION: THE MORALITY OF POLITICAL DIVORCE FROM FORT SUMTER TO LITHUANIA AND QUEBEC (1991); LEE C. BUCHHEIT, SECESSION: THE LEGITIMACY OF SELF-DETERMINATION (1978); GREGORY CRAVEN, SECESSION: THE ULTIMATE STATES RIGHT (1986) (Australia). Articles include Lea Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991); Allen Buchanan, *Toward a Theory of Secession*, 1991 ETHICS 362 (1991); Cass Sunstein, *Constitutionalism and Secession*, 58 U. CHI. L. REV. 633 (1991).

44. The literature on group rights of aboriginal peoples is burgeoning. *See, e.g.*, WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE (1989); BRYAN SCHWARTZ, FIRST PRINCIPLES, SECOND THOUGHTS: ABORIGINAL PEOPLES, CONSTITUTIONAL REFORM AND CANADIAN STATECRAFT (1986); Michael Asch & Patrick Macklem, *Aboriginal Rights and Canadian Sovereignty: An Essay on* R. v. Sparrow, 29 ALBERTA L. REV. 498 (1991); John R. Danley, *Liberalism, Aboriginal Rights, and Cultural Minorities*, 20 PHIL. & PUB. AFFAIRS 168 (1991); L. C. Green, *Aboriginal Peoples, International Law and the Canadian Charter of Rights and Freedoms*, 61 CAN. B. REV. 339 (1983); Douglas Sanders, *The Re-Emergence of Indigenous Questions in International Law*, *in* CAN. HUM. RTS. Y.B. 1983 (W. Pentney & D. Proulx eds., 1983); Torres, *supra* note 17.

45. BUCHANAN, *supra* note 43, at 5. The Amish might be cited as a group that should not be forced to conform, even though the Amish presumably are not contemplating secession. *See* Jensen, *supra* note 24, at 1136-37 (discussing Wisconsin v. Yoder, 406 U.S. 205 (1972)).

of secession at all—and not all would agree there should be[46]—some Indian tribes seem to be prime candidates. They have many factors on their side, including acknowledged territory; a history of separation from the dominant society and resistance to full assimilation; and self-government (at least in part). Indigenous societies that have at no time come close to assimilation—but which have found themselves artificially incorporated into larger nation-states—are attractive candidates to sever purely formal ties.

At this point, I can present no unequivocal conclusion that secession is in fact a theoretical possibility for American Indian tribes. Much more work is needed, and in this essay I intend merely to call for further scholarly exploration of this issue.

Obviously the secession issue is, in part, an artificial one. Whatever the justifications for complete separation, it can occur only with the consent of the American federal government.[47] No arguments in an academic law review can ever lead, by themselves, to such a substantial change in policy—or so one hopes. Furthermore, not all tribes can seriously consider secession. Some are so small, in both population and territory, that full nationhood is implausible. And for most tribes, including some with sizeable populations, economic self-sufficiency is a dream. Unless it were to be coupled with substantial severance payments,[48] secession from the United States would mean economic disaster for those tribes.

I nonetheless believe in the importance of this exercise. The secession issue *is* an academic one, but it is not only that. Theoretical arguments do have force and, when coupled with the practical pressures for increased separation, they could tip the balance, at least in the case of some of the more populous and more economically self-sufficient tribes. The time has come for those Indian law theorists who press for increased separation to study the literature of secession and to put together the strongest possible body of theoretical arguments on its behalf.

46. I admit to many reservations about the concept, perhaps because of its suspect history in the United States.

47. *See* Newton, *supra* note 4 (describing federal plenary power doctrine).

48. *See* Clinton, *supra* note 42, at 158 (calling for reversion to tribes of previously condemned land).